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In The SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 484

GRADY COUNTY, GEORGIA
Petitioner

versus

IMOGENE WRIGHT DICKERSON
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitution and Statutory Provisions	3
Statement of the Case	3
Basis of Federal Jurisdiction	4
Reasons and Argument for Allowance of Writ	5
Conclusions	19
Appendix	20

CITATIONS

Cases	Page
Barwick v. Roberts, 187 Ga. 695	6
Board of Supervisor of Mercer County v. Cowles, 74 U. S. 118	12
Brand v. Pennsylvania Railway Co., 22 F. Supp. 569	17
Broadwater Missouri Water Users Association, v. Montana Power Co., 139 F. 2d, 998	6
Cannon v. Montgomery, 184 Ga. 588	7
Chicot County v. Sherwood, 148 U. S. 529	13, 14
Covington County v. Stevens, 256 F. 328	15, 16
Decatur County v. Praytor, 163 Ga. 929	12, 13
Dent v. Cook, 45 Ga. 323	12, 13
Elberton Southern Railway Co. v. State Highway Department of Georgia, 211 Ga. 838	10
Ex. Parte: In the Matter of The State of Nebraska, 209 U. S. 436	11
Ex Parte State of New York, 256 U. S. 490	7
Favor v. Mayor etc. of Washington, 159 Ga. 568	8
Ford Motor Co. v. Department of Treasury of Indiana, 323 U. S. 459	10, 11
Fowler v. California Toll Bridge Authority, 128 F. 2d, 549	6
Georgia, Florida & Alabama Railway Co. v. Sasser, 130 Ga. 394	9
Hardin v. State Highway Board, 185 Ga. 617	9
Kansas City So. Ry. Co. v. Morley, 88 F. Supp. 300	10
Kennecott Copper Corp. v. State Tax Commission, 327 U. S. 573	10, 11
Lincoln County v. Luning, 133 U. S. 766	11, 12

Cases Page

Louisville, Cincinnati & Charleston Railroad Co. v. Letson, 43 U. S. 503 14

Oklahoma Realty Commission v. National Business and Property Exchange, 229 F. 2d, 205 5, 6, 10

O'Neill v. Early, 208 F. 2d, 286 5

Patterson v. Standard Oil Co. of N. J., 41 F. 2d, 219 16

Pennoyer v. McConnaughy, 140 U. S. 1 11

Pennsylvania Turnpike Commission v. Welsh, 188 F. 2d, 447 5, 10

People of Colorado ex rel. Watrous v. District Court of U. S. for the District of Colorado, 207 F. 2d, 50 5, 10

Port of Seattle v. Oregon & W. Railroad, 255 U. S. 56 14

Prudential Insurance Co. of America v. Murphy, 328 U. S. 408 10, 11

Read v. National Equity Life Insurance Co., 114 F. 2d, 977 5

Rotan v. State, 195 N. C. 291 7

Schwarcz v. Charlton County, 211 Ga. 923 9, 16, 17, 18

Shaffer v. Branch, 201 N. C. 415 16

Southern Mining Co. v. Lowe, 135 Ga. 352 6

Standard Stoker Co. v. Lower, 46 F. 2d, 678 16

State Highway Board v. Perkerson, 185 Ga. 617 9

State of Minnesota v. Hitchcock, 185 U. S. 373 11

State v. President, etc. 1 S. C. 63 7

Taylor v. Richmond County, 185 Ga. 610 9

Throckmorton v. State, 219 N. Y. Supp. 566 7

Wood v. Floyd County, 161 Ga. 673 12, 13

Constitutional Provisions — Page

Constitution of the United States

Article I, Sec. 10, Par. I 20

Amendment XI 20

Constitution of the State of Georgia

Art. XI, Sec. I, Par. I 20

Statutory Provisions

Federal Statutes

28 U. S. C. § 1254 (1) 20

28 U. S. C. § 2101 (c) 20

Georgia Statutes

Ga. Code,

Section 23-1502 21

Section 95-1001 21

Section 95-1701 22

Section 95-1702 22

Section 95-1705 22

Section 95-1709 22

Section 95-1710 23

Section 95-1711 23

Section 95-1721 24

Section 102-103 25

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Grady County, Georgia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case.

I.

OPINIONS BELOW

The opinion of the District Court (R. 383-386) has not been reported. The opinion of the Court of Appeals (R. 394-403) has not been reported, but is appended hereto. See Appendix, *infra*, p. 26.

II.

JURISDICTION

The judgment of the Court of Appeals (R. 404) was entered June 30, 1958. A petition for rehearing (R. 409-418) was denied (R. 459) September 17, 1958. The jurisdiction of this Court is invoked under the provisions of 28 U S. C. § 1254 (1) and 28 U. S. C. §2101 (c).

III.

QUESTIONS PRESENTED

1.

Under the Constitution and laws of the State of Georgia, as well as the provisions of the Constitution of the United States, especially the Eleventh Amendment to such Constitution, does the jurisdiction of the Federal courts embrace actions for damages against a county of the State of Georgia?

2.

Where, as in this case, a county of the State of Georgia is prohibited by law from paying the judgment which may be ultimately rendered, although the county is named as the defendant of record, and, where it is provided by law that the State of Georgia is required to defend the lawsuit in the name of the county, is given authority by law to control the lawsuit and to settle it upon such terms as it (the State) may deem advisable, and is further required by the laws of the State to be ultimately liable for any judgment which may be rendered in such suit, is this such a suit against the State as is prohibited by the Eleventh Amendment to the Constitution of the United States?

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set out in the Appendix, *infra*, pp. 20-25.

V.

STATEMENT OF THE CASE

On June 15, 1956, Mrs. Imogene Wright Dickerson brought an action against Grady County, Georgia, in the United States District Court for the Middle District of Georgia (R. 1-6), in which she sought to recover in damages the sum of $102,857.00 for the death of her husband, allegedly growing out of the defendant's negligent maintenance of a defective bridge. The suit was alleged to be maintainable under the provisions of Georgia Code of 1933, Section 95-1001 (Appendix, p. 21), and the State Highway Department of Georgia was vouched into court to defend the suit and to be ultimately liable for any damages awarded against Grady County under the terms of Georgia Code of 1933, Section 95-1710 (Appendix, p. 23). The jurisdiction of the District Court was predicated upon the alleged diversity of citizenship and the allegation that the matter in controversy exceeds the requisite jurisdictional sum of $3,000.00.

Concomitant with the filing of its other defensive pleadings, the defendant filed its motion to dismiss for want of jurisdiction (R. 13-16), upon the ground that the suit was one in reality against the State of Georgia, coming within the immunity of the Eleventh Amendment of the Constitution of the United States (Appendix, p. 20). The District Court denied such motion

(R. 28), and upon a trial of the case a verdict was returned in favor of the plaintiff (R. 378) after a motion for a directed verdict had been properly made (R. 341), and denied (R. 341). The defendant's motion for a new trial (R. 379) and for judgment *non obstante veredicto* (R. 379) were denied (R. 383-386). Within the time and in the way and manner provided by law, the defendant appealed to the Court of Appeals for the Fifth Circuit for a reversal of the order and judgments indicated above. The Court of Appeals in an opinion, dated June 30, 1958 (R. 394-403), affirmed the order and judgments of the District Court, and also denied the defendant's motion for rehearing (R. 409-418; R. 459), holding, in effect, that, by virtue of certain Constitutional and statutory provisions in force in Georgia neither the State nor its agency, the State Highway Department, was a party to the suit so as to come within the immunity of the Eleventh Amendment to the Constitution of the United States, and further holding that a county in Georgia is subject to suit, as a corporate entity as a citizen of Georgia.

VI.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance, the United States District Court for the Middle District of Georgia, was based by respondent upon the alleged diversity of citizenship, the alleged requisite jurisdictional amount in controversy, and the contention that the immunity of the State of Georgia under the provisions of the Eleventh Amendment to the Constitution of the United States does not extend to a suit against a Georgia county.

VII.

REASONS AND ARGUMENT FOR THE ALLOWANCE OF WRIT

1.

The court of Appeals for the Fifth Circuit has rendered a decision in the present case in conflict with decisions of other United States Courts of Appeal on the same matter on three important and substantial points by holding:

(a) The State is not the real party at interest.

(b) The State Highway Department is not an agency through which the State necessarily performs part of its governmental functions and therefore exempt from suit in the United States Courts.

(c) The State, by consenting for a county and the State Highway Department to be sued, has consented for them to be sued in a Federal court.

"Whether or not such suit is against a State is to be determined not by the mere name of the titular party but by the essential nature and effect of the proceedings as it appears from the entire record." *Oklahoma Real Estate Commission v. National Business and Property Exchange, Inc.*, (10th Cir.) 229 F. 2d, 205 (1955).

See also: *O'Neill v. Early* (4th Cir.) 208 F. 2d, 286 (1953); *Read v. National Equity Life Insurance Co.* (10th Cir.) 114 F. 2d, 977 (1940); *Pennsylvania Turnpike Commission v. Welsh* (3rd Cir.) 188 F. 2d, 447 (1951); *People of Colorado ex rel Watrous v. District Court of U. S. for District of Colorado* (10th Cir.) 207 F. 2d, 50 (1953).

As was said of the Real Estate Commission in the *Oklahoma Real Estate Commission* case, *supra*, the State Highway Department is merely a channel through which the State performs part of its necessary governmental functions, and the result of any judgment or decision in this case will operate against the State. See in this connection *Fowler v. California Toll Bridge Authority* (9th Cir.) 128 F. 2d, 549 (1942); *Broadwater Missouri Water Users Association v. Montana Power Co.* (9th Cir.) 139 F. 2d, 998 (1944).

While the State has specifically consented that a county and the State Highway Department may sue and be sued in its courts, such consent is not a consent to be sued in a Federal court. *Oklahoma Real Estate Commission v. National Business and Property Exchange, supra.*

The conflict between the decisions of the Circuit Courts of Appeal rendering the decisions just cited and the decision of the Circuit Court of Appeals for the Fifth Circuit is strikingly apparent and an authoritative decision, which only this Court can render, should be made, reconciling the conflict between the Circuit Courts, and correcting the error of the Fifth Circuit Court of Appeals.

2.

The Court of Appeals for the 5th Circuit has decided an important State question in a way in conflict with applicable laws of the State of Georgia.

In *Barwick v. Roberts*, 187 Ga. 695, the Supreme Court of Georgia held:

> "The general rule that is applicable in all cases is that any case, regardless of who are named parties

thereto, that could result in a judgment or decree that would in any manner affect or control the property or action of the State, in a manner not prescribed by statute, is a suit against the State and cannot be brought without her consent. *Cannon v. Montgomery*, 184 Ga. 588 (192 S. E. 677); *Southern Mining Co. v. Lowe*, 105 Ga. 352 (31 S. E. 191); *State v. President, etc.*, 1 S. C. 63; *Rotan v. State*, 195 N. C. (141 S. E. 732); *Throckmorton v. State*, 128 Misc. 599 (219 N. Y. Supp. 566); *Ex Parte State of New York*, 256 U. S. 490 (41 Sup. Ct. 588, 65 L. Ed. 1057)."

3.

The Court of Appeals for the Fifth Circuit has decided an important Federal jurisdictional question, as relates to suits *against counties of Georgia* for damages occurring on State-aid roads which has not been, but should be settled by the Supreme Court of the United States.

4.

The Court of Appeals for the Fifth Circuit has decided a Federal jurisdictional question in a way in conflict with applicable decisions of the Supreme Court of the United States.

With the indulgence of the Court, we present our argument concerning the three preceding reasons for granting the writ, (2, 3, and 4) together as they are closely interrelated.

The decision of the United States Court of Appeals for the Fifth Circuit is contrary to the decisions of this Court.

For a clear understanding of the principles of law

involved in a decision of these three questions, it is necessary to point out the provisions of Georgia law governing the establishment, control, and maintenance of a State-aid road. Please see Code, §§ 95-1701; 95-1702; 95-1705; 95-1711 and 95-1721 (Appendix, p. 22-24).

The State Highway Department of Georgia was first created by the Act of the General Assembly of Georgia of 1916 (Ga. L. 1916, p. 125). The Act of 1919 (Ga. L. 1919, p. 247), from which the above referred to provisions of Georgia law were codified, was a reorganization of that Department. Prior to that time, all roads of the State of Georgia had fallen into two general classifications, either county roads or city streets. The System of State-aid Roads came into being with the Act of 1919.

When a county road was taken into the State-aid System, Code, §§95-1701; 95-1705 (Appendix, pp. 22), the county was thereafter relieved of any responsibility for levying taxes for either the construction or maintenance of such a road, and was prohibited by law from so using any of its funds. Code, § 95-1709 (Appendix, p. 22). Please see *Favor v. May, etc. of Washington*, 159 Ga. 568, 576, wherein the Court said:

> "This provision is a limitation upon the power of the county to levy taxes for the construction and maintenance of State-aid highways."

In its wisdom, however, the Georgia Legislature thought it wise to make a provision in the same Act of 1919, (Code, §95-1710, Appendix, p. 23), whereby as to a cause of action arising upon a State-aid road, the State Highway Department was required to defend the lawsuit and to be ultimately responsible for any judgment which might be rendered therein; but also,

for purposes of venue, provided that the county involved should be the nominal party defendant. It will be noted that this section authorizes the State Highway Department to adjust and settle any such claim in the name of the County and "on its own behalf." For a clear understanding of the relationship between the State Highway Department and the county, we refer the Court to the decisions of the Supreme Court of Georgia in the cases of *Taylor v. Richmond County*, 185 Ga. 610; *Hardin v. State Highway Board*, 185 Ga. 614, 616; *State Highway Board v. Perkerson*, 185 Ga. 617; and to the case of *Schwarcz v. Charlton County*, 211 Ga. 923, which must be understood and construed in the light of the rulings of the Supreme Court of Georgia in the aforesaid cases.

Code §95-1710, *supra*, must be construed in conformity with Georgia Code §102-103, (Appendix, p. 25), which provides that when the word, "may," is used in a statute concerning the public interest, it will be construed to mean "must." Please see the case of *Georgia, Florida & Alabama Railway Co. v. Sasser*, 130 Ga. 394, 395.

The present lawsuit is founded upon what is known in Georgia as the Defective Bridge Law, (Code, §95-1001, Appendix, p. 21). The suit alleges that the death of the deceased was caused by a defective bridge upon a State-aid road. (R. 3).

Under the provisions of Code, §95-1709, *supra*, there is no way known to man or to the law for any judgment upon such cause to be paid out of the funds of the defendant of record, Grady County, but, in compliance with Code §95-1710, *supra*, described in the *Taylor* case, *supra*, as a "*novel procedure*" of Georgia law, the suit was brought against Grady County and that

county "vouched" the State Highway Department to defend the same.

Thus, it becomes readily apparent that the defendant of record in this case, now petitioner for certiorari is nothing more than a nominal defendant, a "John Doe" party to the record of this lawsuit. The *real defendant in this lawsuit* and the *real petitioner* for certiorari to this Court is the State of Georgia, pleading in the name of the nominal defendant as required by law and the rulings of the Supreme Court of Georgia in the case of *Schwarcz v. Charlton County, supra.* That the State Highway Department is the State is established by a long line of decisions by the Supreme Court of Georgia, and most recently in the case of *Elberton Southern Railway Co. v. State Highway Department of Georgia*, 211 Ga. 838.

As we endeavored so insistently to urge upon the Court of Appeals, statutes of the State of Georgia, conferring upon its courts jurisdiction of suits against the State and its subdivisions or agencies, are to be strictly construed and in the absence of an expression to the contrary such statutes will be held to confer jurisdiction solely upon its own courts and not also upon the Federal courts. See in this connection: *Kennecott Copper Corporation v. State Tax Commission*, 327 U. S. 573; *Oklahoma Realty Commission v. National Business and Property Exchange*, 229 F. 2d, 205; *Kansas City So. Ry. Co. v. Morley*, 88 F. Supp. 300; *Prudential Ins. Co. of America v. Murphy*, 328 U. S. 408; *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U. S. 459; *Pennsylvania Turnpike Commission v. Welsh*, 188 F. 2d, 447). This rule has been quite cogently stated in the case of *People of Colorado ex rel. Watrous v. District Court of U. S. for*

the District of Colorado, 207 F. 2d, 50, where it is stated that the question whether the action is one against a State is to be determined not by the fact of the party named as the defendant on the record but by the result of the judgment or decree which may be entered.

The title to the suit is not the controlling factor, but the Court must and will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit as shown by the record and will ascertain who are the real defendants and will determine that question on the basis of who will be ultimately affected by the judgment rendered in such an action. If such an inquiry by the Court shows that one of the sovereign States is the real party at interest, though not named as a defendant of record, the suit becomes one against the State and is barred by the Eleventh Amendment to the Constitution of the United States. (Appendix, p. 20). See in this connection: *Pennoyer v. McConnaughy*, 140 U. S. 1; *State of Minnesota v. Hitchcock*, 185 U. S. 373; *Ex Parte: In the Matter of The State of Nebraska*, 209 U. S. 436; *Kennecott Copper Corporation v. State Tax Commission*, 327 U. S. 573; *Prudential Insurance Co. of America v. Murphy*, 328 U. S. 408; *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U. S. 459.

5.

The decision of the United States Court of Appeals for the Fifth Circuit misapplies the decision of this Court in the case of *Lincoln County v. Luning*, 133 U. S. 529.

A county in Georgia is not subject to suit except where it is specifically so provided by law. Code, §§2-

7801; 23-1502. The status of a county in any given State depends upon the provisions of the Constitution and laws of the particular State involved. The *Lincoln County* case, *supra*, and the rulings of this Court in that case, were founded upon the Constitution and laws of the State of Nevada, in which State the Constitution provides that a county shall be subject to suit *in the same way and manner as any other citizen*. Nor, is a *county in Georgia* to be confused with a *municipal corporation*. *Wood v. Floyd County*, 161 Ga. 743; *Dent v. Cook*, 45 Ga. 323, 327; *Decatur County v. Praytor*, 163 Ga. 929, 931.

In the *Praytor* case, *supra*, the Supreme Court of Georgia stated quite definitely, in construing the statute making counties of Georgia subject to suit, that the statute subjects counties to suit, "but not to suits upon all causes of action. *It does not make them generally liable to suits, like individuals or municipal corporations.*"

In the case of the *Board of Supervisors of Mercer County v. Cowles*, 74 U. S. 118, 122, wherein this Court upheld the jurisdiction of the Federal courts over Mercer County, it appears that the State of Illinois, by an Act of 1845, had changed the status of its counties so that they were no longer part and parcel of the State government but occupied the position of a "township," thus creating a corporation subject to suit in the same manner as any private corporation.

Counties in Georgia occupy a very different position from that of a "township" as provided for in the aforesaid Act of 1845 by the State of Illinois. In Georgia, counties are subdivisions of the State itself, and are never suable except by express enactment of the legislature. They are parts of the sovereign power, clothed

with public duties which belong to the State, which, for convenience, are divided among local organizations. *Wood v. Floyd County*, 161 Ga. 743; *Dent v. Cook*, 45 Ga. 323, 327; *Decatur County v. Praytor*, 163 Ga. 929, 931.

Is a Georgia county to be subjected to suit for a cause of action, prohibited by the Constitution and laws of the State of Georgia and of the United States, by the strategic expediency of bypassing the State courts and bringing the suit in the United States courts? We think that the obvious and necessary answer to this question is in the negative; for, otherwise, it must be said that the traditional sovereignty of the several States of this Union has now been reduced to a mere fable. It follows logically, therefore, that, if the Federal courts have no jurisdiction over an alleged cause of action against a county of Georgia, for which provision is not made by the Georgia "consent statutes," it is likewise true that the jurisdiction of such courts over a Georgia county is completely dependent upon the provisions of the Constitution and laws of Georgia concerning the suability of its counties, and such jurisdiction is not to be determined by the decision of this or any other court as to counties in another State which have a completely different status and are subject to entirely different provisions of law.

The case of *Chicot County v. Sherwood*, 148 U. S. 529, 532, cited by Judge Rives in his concurring opinion, is distinguishable from the present case in several vital respects. In the first place, it does not appear from the decision of the Court that the constitutional status of a county in Arkansas was raised in that case, or considered by the Court in making the ruling set forth in that case. Secondly, the cause of action relied

upon in said case grew out of the issuance of certain bonds by the county and sold to the citizens of another State. The bonds were issued in 1872, and, subsequent thereto, in 1879, the State of Arkansas enacted a statute barring suits against a county except in certain instances and requiring a certain procedure. While it is not mentioned in the decision, this amounted to an impairment of contract in violation of the provisions of the United States Constitution, Article I, Section 10, Paragraph I, thus posing a Federal question of which the United States courts have original jurisdiction. Furthermore, it does not appear from the decision that the contention was ever made by Chicot County that it was not suable in the Federal courts at the time of the issuance of said bonds in 1872, but its motion to dismiss was based entirely on the Act of 1879, "repealing all laws authorizing counties in the State to sue and be sued." Thus, the necessary implication is that it was conceded by Chicot County that it could have been sued in the Federal courts at the time of the issuance of the bonds in 1872, but that it later contended that this consent to be sued had been withdrawn by the Act of 1879.

We think, therefore, that the *Chicot* case was one coming squarely within the rule laid down by this Court in the case of *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U. S. 503, wherein the Court said in distinguishing that case:

> "It was a case in which the jurisdiction of the Federal courts depended altogether upon the nature of the case, and not at all on the character of the parties."

The other case cited by Judge Rives in his concurring opinion, *Port of Seattle v. Oregon & W. Railroad*, 255

U. S. 56, 71, is clearly distinguishable from this case; for as Mr. Justice Brandeis, in delivering the opinion of the Court, pointed out on page 71:

> "The objection to the jurisdiction of the District Court is clearly unsound. The Port, being a *municipal corporation* under the laws of Washington, is a citizen of that State, and could have been sued in the Federal court."

6.

The decision of the United States Court of Appeals for the Fifth Circuit misapplied the decision of that Court in the case of *Covington County v. Stevens*, (5th Cir.) 256 F. 328 (1919).

The Court of Appeals, in its opinion rendered in this case, cites the case of *Covington County v. Stevens, supra*, as authority for its holding that a Georgia county is subject to the jurisdiction of the Federal court for such a cause of action as the one herein presented. That holding is clearly erroneous and it is so demonstrated by the case relied upon. In that case no question was presented as to the constitutional status of an Alabama county; no question was raised by the county as to the jurisdiction of the Federal courts over it; nor did the Court make any ruling of any kind or character concerning its jurisdiction or want of jurisdiction over the county. The only holding of the court, even remotely applicable to the facts of this case is summarized in Headnote 1, wherein it is said:

> "A state law requiring claims against the county to be presented to the County Board before suit may be maintained thereon is reasonable and valid, and will be recognized and enforced by a Federal court unless the county board has taken action

which was equivalent to rejection of the claim, and rendered its presentation unnecessary and futile."

There is nothing said in the *Covington* case, *supra*, which, by any stretch of the imagination, authorizes the holding set out on page 4 (R. 397) of the opinion of the Court that:

> "Where the legislature of the state has imposed a duty upon counties and has provided for action against counties to enforce liability for breaches of such duties, the State may not deprive the courts of the United States of the jurisdiction which it has under the Constitution and laws of the United States to decide cases where enforcement of such liability is sought."

7.

The decision of the United States Court of Appeals for the Fifth Circuit misapplies the decision of the Supreme Court of Georgia in the case of *Schwarcz v. Charlton County*, 211 Ga. 923.

The Court of Appeals misconstrued and misapplied the decision of the Supreme Court of Georgia. The distinction between jurisdiction and venue is that "jurisdiction" imports power of court, "venue" the place of action. *Shaffer v. Branch*, 201 N. C. 415.

"Jurisdiction" connotes power to decide a case on its merits, while "venue" connotes locality — place where suit should be heard. *Standard Stoker Co. v. Lower* (D.C. Md.) 46 F. 2d, 678, 683.

The word "jurisdiction" is often used loosely and incorrectly when, as a matter of fact, "venue" is the thing being talked about. Please see *Patterson v. Standard Oil Co. of* N. J. (D.C. N.Y.) 41 F. 2d, 219.

The "jurisdiction" of a court to decide a cause judicially is its judicial power to do so, "jurisdiction" being of several kinds, as jurisdiction of the subject matter and of the parties, and what is termed "venue jurisdiction," which means the power of the particular court to function. Please see *Brand v. Pennsylvania Railway Co.* (D.C. Pa.), 22 F. Supp. 569, 571.

The *Schwarcz* case, *supra*, was a case wherein the word "jurisdiction," was used to mean "venue jurisdiction," as discussed in the *Brand v. Penn. RR. Co.* case, *supra*, (R. 449).

Thus, it is clear that the Supreme Court of Georgia, in making the rulings found in the *Schwarcz* case, and in using the word, "jurisdiction," in the way and manner set forth in that decision, was not talking about or ruling upon "jurisdiction" as such, but was ruling only upon the question of "venue jurisdiction."

In the *Schwarcz* case, the State Highway Department of Georgia undertook to file, in its own name, a pleading which was called a "plea to the jurisdiction." (R. 448). A certified copy of the pleading, as it appears of record in the Supreme Court of Georgia, was attached to and made a part of the brief of petitioner for certiorari before the Court of Appeals on petition for rehearing. (R. 448). This pleading conclusively discloses that it was the contention of the defendant, not that a superior court of the State of Georgia would have no jurisdiction of either the defendants or the subject matter of the lawsuit, but that it was their contention that the venue of such an action was improperly laid in Glynn County and should have been laid in Charlton County. The decision of the Supreme Court of Georgia in the *Schwarcz* case shows that it was the contention of the State Highway Department in

undertaking to make itself a party defendant for the purpose of the aforesaid "plea to the jurisdiction," that, although the Superior Court of Glynn County might have had venue jurisdiction of the defendant, Charlton County, by reason of the fact that it was named a co-defendant along with a resident defendant of Glynn County, this venue jurisdiction was ousted by the "vouchment" of the State Highway Department under the provisions of Code Section 95-1710 (Appendix, p. 23). In this connection, and in ruling on this question, the Supreme Court of Georgia said on page 927 of said decision:

> "If at the time of the filing of the suit the Court had jurisdiction over the county as a party defendant, such jurisdiction was not ousted by the filing of a plea to the jurisdiction by the State Highway Department or the county on the ground that the court had no jurisdiction over it."

Thus, it is clearly demonstrated that the Supreme Court of Georgia was talking about "venue" or "venue jurisdiction," and without any intention to rule upon "jurisdiction," as such, whether the same be of subject matter or parties.

Properly construed and applied, we are of the opinion that the rulings of the Supreme Court of Georgia in the *Schwarcz* case are a correct statement of the principles of law involved, but we feel obliged to point out to the Court that those rulings were and are *obiter dicta*, for the reason that the case was finally and conclusively disposed of when the Court held that the court below had properly sustained the general demurrer of the resident defendant, Seaboard Construction Company, and then dismissed the suit as to the other named defendant because of a lack of "venue."

This further emphasizes, of course, our contention that the Supreme Court of Georgia was dealing only with the question of "venue."

VIII.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Constitution Provisions

Constitution of the United States:

> Article I, Section 10, Paragraph 1. No State shall... pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts.
>
> Amendment XI. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Constitution of the State of Georgia of 1945

> Article XI, Section I, Paragraph I. Each county shall be a body corporate with such powers and limitations as may be prescribed by law. All suits by or against a county shall be in the name thereof; and the metes and bounds of the several counties shall remain as now prescribed by law, unless changed as herein provided.

Statutory Provisions

Federal Statutory Provisions:

> 28 U. S. Code §1254 (1). Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil case or criminal case, before or after rendition of judgment or decree.
>
> 28 U. S. Code §2101 (c). Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding

before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

Georgia Statutory Provisions:

GA. CODE §23-1502. *When county liable to suit.* A county is not liable to suit for any cause of action unless made so by statute. (72 Ga. 188; 79 Ga. 127 (4 S. E. 20).)

GA. CODE §95-1001. *Condition of contractor's bond. County's liability for injuries caused by defective bridges.* When the contract for a public bridge, ferry, or causeway is let, the contractor's bond shall be conditioned also to keep it in good repair for at least seven years, and as many more years as may be covered by the contract: Provided, that such contract may be let under existing laws without requiring the aforesaid condition in the contractors' bonds, if in the opinion of the commissioners of roads and revenues, or of the ordinary in counties where there are no such commissioners, it would be to the public interest to dispense with said condition in said bond: Provided, however, that in every case the county shall be primarily liable for all injuries caused by reason of any defective bridges, whether erected by contractors or county authorities. The term "bridges" in this section shall be defined as a structure erected to afford unrestricted vehicular traffic over an obstruction in the public highways of the State, including rivers, streams, ponds, lakes, bays, ravines, gullies, railroads, public highways and canals; the term bridge as defined in this section shall include the approaches to the structure previously defined within 50 feet of either end of said structure except

where the bridge itself measures 100 feet or more and in said event within 100 feet of either end of said structure. (Acts 1888, p. 39; 1953, p. 120.)

GA. CODE §95-1701. *System of State-aid roads created; bridges included.* There is hereby created a system of State-aid roads for the purpose of interconnecting the several county seats, which shall be designated, constructed, improved, and maintained by the State through the State Highway Department, under the provisions of law; and the term "State-aid roads" shall include the State or interstate bridges and other subsidiary structures necessary or desirable in the construction of said roads. (Acts 1919, p. 247.)

GA. CODE §95-1702. *State-aid road fund.* There is hereby created a State-aid road fund, to be controlled and expended by the State Highway Board as herein provided for, and said fund shall consist of the moneys which are provided for herein, and which may from time to time be appropriated, or provided for road or highway work by the State, or which may be obtained from other sources. (Acts 1919, p. 247.)

GA. CODE §95-1705. *Designation of State-aid roads.* The State Highway Board shall designate the system of interconnecting county-seat public roads to be known as State-aid roads, as provided in the following sections. No road shall become a part of the State-aid system until the same shall be so designated by the State Highway Board by written notice to the county road authorities concerned. (Acts 1919, p. 248.)

GA. CODE §95-1709. *County funds not to be used.* When any portion of the designated State-aid road

system is taken under the jurisdiction of the State Highway Department, no county in which said portion is located shall thereafter be required to levy taxes for the construction or maintenance of said portion, nor to use any of its funds or road forces in the construction or maintenance thereof. (Acts 1919, p. 249; 1929, pp. 260, 264.)

GA. CODE §95-1710. *Suit against county.* The State Highway Department shall defend all suits and be responsible for all damages awarded against any county under existing laws, whenever the cause of action originates on highways, jurisdiction over which shall have been assumed by said Highway Department under the terms of this law. Any county sued may vouch said Highway Department to defend such litigation, by furnishing said Highway Department with a notice to defend such suit, to which said notice shall be attached a copy of the petition served on said county. Said notice shall be given to the State Highway Department at least 10 days prior to the return day of the term at which said suit must be answered. The State Highway Department shall have the right and authority to adjust and settle in the name of such county and on its own behalf any claim for damages for which the State Highway Department may be ultimately liable under the terms of this section. (Acts 1919, p. 249; 1922, p. 176.)

GA. CODE §95-1711. *Roads constituting the State-aid System.* The State-aid system shall consist of such roads as have been, or may be, authorized by law and designated by the State Highway Board as provided in section 95-1705. The State Highway Board shall exercise its best judgment as to when and in what manner such roads shall be com-

pleted and paved, and no additional maintenance cost shall be added until such roads shall have been located and constructed. (Acts 1929, pp. 260, 266. 172 Ga. 618 (158 S. E. 329.)

GA. CODE §95-1721. *Control and supervision of State-aid roads; expense of procuring rights of way borne by county.* When a road is approved as a part of the system of State highways, the establishment of such road and its construction, including location, surveys, grading, and paving, shall be under the control and supervision of the State Highway Board. All expenses necessary for such construction, including surveys, the location or relocation of such roads, and all other expenses connected with the establishment and construction thereof, except the expense of procuring rights of way, shall be paid by the Board out of funds allocated to the Highway Department. It shall be the duty of county commissioners or other county authorities having control of county roads to assist in procuring the necessary rights of way as cheaply as possible, and all expenses thereof, including the purchase price of any land purchased for a right of way, and all direct and consequential damages awarded in any proceeding brought to condemn any such right of way, shall be paid by the county in which such road is situated out of the county treasury: Provided, that nothing contained in this section shall prevent the State Highway Board from using State highway funds for the purpose of purchasing rights of way, or to pay the purchase price thereof, or to pay any damages awarded on account of the location of any such State-aid road, or from assisting the counties in so doing. (Acts 1935, p. 160.)

GA. CODE §102-103. *Meaning of certain words.* The following meanings shall be given to the following words in all statutes, unless a different meaning is apparent from the context:

May ordinarily denotes permission and not command. Where the word as used in a statute concerns the public interest or affects the rights of third persons it will be construed to mean "must" or "shall." (130 Ga. 394, 395 (60 S. E. 997.)

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17045

GRADY COUNTY, GEORGIA
Appellant

versus

IMOGENE WRIGHT DICKERSON
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

(June 30, 1958.)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: Donald Thomas Dickerson, the husband of the appellee, was driving his automobile through Grady County, Georgia, over U. S. Highway No. 84, also known as State Route 38, on the afternoon of August 6, 1955. There had been an unusually heavy rain. The rain slacked off from heavy to moderate. As the car approached a bridge over Brumbley Creek it went out of control and collided with an abutment on the left side of the bridge. Dickerson was thrown from the car and killed. The decedent's widow, residing in Louisiana and basing Federal jurisdiction on diversity of citizenship, sued Grady County under the Georgia

statute known as the defective bridge law.[1] She alleged that the County had negligently permitted the bridge and the approach to it to be and remain in a bad state of repair, and that its negligence was the direct and proximate cause of her husband's death.

The highway upon which the fatal accident occurred was a State-aid road which the State Highway Department was under a duty to maintain under the laws of Georgia.[2] The statute imposes upon the State Highway Department the duty to defend suits against counties where the cause of action has its origin on a highway which the State has taken over.[3] Grady County vouched in the State Highway Department and it, acting in the name of Grady County, filed a motion to dismiss and an answer. By the motion to dismiss it was asserted that the court was without jurisdiction. In challenging the jurisdiction of the court, it was contended in the district court and is here contended that under the Georgia

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[1] "* * * Provided, however, that in every case the county shall be primarily liable for all injuries caused by reason of any defective bridges, whether erected by contractors or county authorities. The term 'bridges' in this section shall be defined as a structure erected to afford unrestricted vehicular traffic over an obstruction in the public highway of the State, including rivers, streams, ponds, lakes, bays, ravings, gullies, railroads, public highways and canals; the term bridge as defined in this section shall include the approaches to the structure previously defined within 50 feet of either end of said structure except where the bridge itself measures 100 feet or more and in said event within 100 feet of either end of said structure." Georgia Code § 95-1001.

[2] Georgia Code §§ 95-1701 et seq.

[3] "The State Highway Department shall defend all suits and be responsible for all damages awarded against any county under existing laws, whenever the cause of action originates on highways, jurisdiction over which shall have been assumed by said Highway Department under the terms of this law. Any county sued may vouch said Highway Department to defend such litigation, by furnishing said Highway Department with a notice to defend such suit, to which said notice shall be attached a copy of the petition served on said county. Said notice shall be given to the State Highway Department at least 10 days prior to the return day of the term at which said suit must be answered. The State Highway Department shall have the right and authority to adjust and settle in the name of such county and on its own behalf any claim for damages for which the State Highway Department may be ultimately liable under the terms of this section." Georgia Code § 95-1710.

statutes the county was only a nominal defendant with the State Highway Department being, in reality, the defendant in the cause. The State Highway Department urged in the district court and here urges that it is the State of Georgia which has not consented to be sued in cases of this kind except in its own courts. The Eleventh Amendment to the United States Constitution is relied upon to protect the exclusive sovereign jurisdiction of the Georgia courts in cases of this kind.

On this jurisdictional question we are furnished with a precedent from the Supreme Court of Georgia. In *Schwarcz v. Charlton County*, 211 Ga. 923, 89 S. E. 2d 881, it was held that where the State Highway Department was vouched in to defend a suit against a county in an action such as the present litigation, the Department was not a party to the suit even though it was required to defend for and in the name of the county and to answer for any judgment that might be rendered against the county. From the opinion we quote:

> "After the State Highway Department was served with notice of the pendency of the suit against the county, when it came into court to defend the suit it had the right, in the name of the county, to file any and all defensive pleadings to the suit that the county would have had the right to file. Not being subject to being made a party to the suit, it cannot defend the action in its own name and raise issues which the county could not raise. If at the time of filing of the suit the court had jurisdiction over the county as a party defendant, such jurisdiction was not ousted by the filing of a plea to the jurisdiction by the State Highway Department or the county, on the ground that the court had no jurisdiction over it. Jurisdiction is determined as to those who

are the real or actual parties to the suit, and not by one who is not a party though he may be bound ultimately to respond to the judgment rendered in the proceeding." 211 Ga. 923, 927, 89 S.E. 2d 881, 884.

Where the legislature of the state has imposed a duty upon counties and has provided for actions against counties to enforce liability for breaches of such duty, the state may not deprive the courts of the United States of the jurisdiction which it has under the Constitution and laws of the United States to decide cases where enforcement of such liabilities is sought. *Covington County v. Stevens*, 5th Cir. 1919, 256 F. 328. Since the county is subject to suit in a Federal court [4] and, since the State Highway Department, as held in the Schwarcz case, *supra*, cannot raise issues which the county could not raise, it follows that the appellant must fail in its attack on Federal jurisdiction. Neither the State of Georgia nor its agency, the State Highway Department, is a party and the Eleventh Amendment has no application.

By the answer filed by the State Highway Department for and in the name of Grady County, the allegations as to negligence were denied, and the allegations that the decedent's death resulted from the condition of the bridge were denied. The bridge measurement was such that the approach within 100 feet of the structure was regarded as a part of it under Georgia Code, § 95-1001. The case was tried before a jury. There was one eye witness to the accident who testified. This was Jimmie Wood. He testified that he was driving a laundry truck along the highway and observed Dickerson's car behind him. The rain slackened some and Wood

[4] Lincoln County v. Luning, 133 U. S. 529, 10 S.Ct. 363, 33 L. Ed. 766.

rolled down his window and signaled Dickerson to pass. The bridge was a little less than a mile away. Dickerson passed. Wood estimated Dickerson's speed at not over 45 miles per hour. Wood testified that at a point later measured and found to be 674 feet from the bridge, the Dickerson car hit some water in a dip in the highway, "bobbled to the left of the road, the center of the car not passing over the center line, and back to the right, and straightened back up." The witness continued, "Within about 300—somewhere around 350 foot of the bridge he hit another one [puddle of water]. The car bobbled back to the left and then back to the right, and in coming back to the right it came over and scraped the guard rail, pulled back on to the road, hit some water, was pick—looked like just picked the front end of the car up and set it around to the left and headed right into the bridge." Elaborating further, he said that after hitting the guard rail, the Dickerson car pulled back on the road about 115 feet from the bridge and continued on its course until it hit another puddle in a depression in the road "about 40 or 50 foot" from the bridge, whereupon "the car was thrown to the left of the road" and hit the bridge. Wood was about 700 feet from the bridge when Dickerson hit it. He estimated the speed of the Dickerson car at about 45 miles per hour. Witnesses who were not at the scene at the time of the accident estimated the speed at 60 miles per hour, at not over 50 miles per hour, and between 25 and 35 miles per hour.[5] There was evidence showing that the shoulders near the bridge were higher than the pavement and that water had collected and stood on the pavement after a heavy rain.

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[5] In the absence of special hazards requiring lower speeds, the statutory daylight speed limit for rural areas is 60 miles per hour. Georgia Code, § 68-1626.

At the close of the plaintiff's case the defendant moved for an involuntary dismissal. This motion was denied. The defendant moved for a directed verdict after both sides had rested and this motion was denied. The jury returned a verdict for $10,000 and judgment was given for that amount. The defendant then moved for judgment non obstante veredicto or, in the alternative, for a new trial. This motion was also denied. The denials of these motions are separately specified as error. The County insists that the facts, viewed in a light most favorable to the plaintiff widow, demonstrate that the cause of the accident was not the bridge nor its approach within a distance of a hundred feet. As the County, analyzes the evidence, and insists it cannot be otherwise regarded, it was shown that Dickerson's car went out of control 674 feet from the bridge, remained out of control at a point 350 feet from the bridge, was still out of control when it scraped the guard rail, and that Dickerson never regained control. If the County's factual inferences are correct, the cause of the fatal accident had its origin more than a hundred feet from the bridge, and this is so, the County says, whether the cause was a defective highway or negligent driving by the decedent, or both.

It is not here asserted that any evidence was improperly omitted or excluded. It is not contended that there was any error in giving or refusing instructions to the jury. The only question, aside from jurisdiction, goes to the sufficiency of the evidence. The facts shown, the County insists, were such that reasonable men could not have found that the death of the decedent was the direct and proximate result of a defective bridge.

The testimony exhibited in the record is, in some material respects, conflicting. The uncontradicted testi-

mony is such that different inferences might be drawn from it. We see no useful purpose to be served in extending our review of the evidence. The case was typically a case for a jury. The conflicts presented by the evidence have been resolved by the jury's verdict. The evidence was such that the jury could reasonably have found that the Dickerson's car was under control by him at the time it encountered the puddle of water 40 to 50 feet from the bridge proper. The evidence also justified a finding that the puddle of water was permitted to accumulate by reason of the County's negligence in the maintenance of the highway which, under the statute, was treated as a part of the bridge. So we say that the evidence sustains the verdict. Whether we would draw different inferences or reach a different conclusion is not material. For these propositions no extensive citations of authority are required. A statement of the rule and citations to some of the precedents may be found in *Great American Indemnity Co. v. Rose*, 5th Cir. 1957, 242 F. 2d 269.

The judgment appealed from has our approval and is

AFFIRMED.

RIVES, Circuit Judge, Concurring generally and specially:

I concur, and would state an additional reason for my opinion that the Eleventh Amendment does not, in this case, prevent a federal court from acquiring jurisdiction. It is settled that the immunity of a state from suit in a federal court is a personal privilege which may be waived. *Clark v. Barnard*, 1883, 108 U. S. 436, 447. Such a waiver is not lightly to be inferred, but a "* * * clear declaration of a State's consent to suit against

itself in the federal court on *fiscal claims* is required." (Emphasis supplied.) *Kennecott Copper Corp. v. Tax Commission*, 1946, 327 U. S. 573, 577. See also, *Ford Motor Co. v. Department of Treasury*, 1945, 323 U.S. 459, 463, and *Great Northern Ins. Co. v. Read*, 1944, 322 U.S. 47, 54. Each of those three cases was a suit for refund of taxes paid the state. Ordinarily, federal courts sitting in a state are deemed to be courts of that state, but that must be made particularly clear, "when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration." *Great Northern Ins. Co. v. Read, supra*, 322 U.S. at 54, and see the dissenting opinion in *Kennecott Copper Corp. v. Tax Commission, supra*, 327 U.S. at 581. The present suit is a simple tort action where the reasons for denying federal jurisdiction are not so cogent as those existing in suits for refund of state taxes.

Assuming arguendo that, in substance, the State Highway Department is the real defendant in this case, the history and terms of the Georgia legislation, I think, clearly indicate an intention to waive its immunity from suit in a federal court. The bridge in question was constructed subsequent to the Act of the General Assembly of Georgia of 1888, page 39, incorporated into the Code of Georgia of 1933 as section 95-1001 and quoted in pertinent part in footnote 1 to the main opinion. From the enactment of the Act of 1888 to 1919, the county alone was liable for damages from the defective construction or maintenance of a public bridge. No possible doubt existed that the county could have been sued in a federal court. *Lincoln County v. Luning*, 1890, 133 U.S. 529; *Chicot County v. Sherwood*, 1893, 148 U.S. 529; *Port of Seattle v. Oregon & W. RR.*, 1921, 255 U.S. 56, 71.

Since the enactment of the Act of 1919, Georgia Laws, 1919, page 242, et seq., Code §§95-1701, et seq., the county's liability to suits for damages by reason of a defective bridge remains unaffected as to purely county roads, and as to bridges taken into the State-aid system the county is still permitted to be the defendant of record to the lawsuit, and primarily liable, but is required to vouch in the State Highway Department to defend and to be ultimately liable for any damages rendered. There can be no reasonable contention but that a county can now be sued in a federal court for damages arising from a defective bridge on a purely county road. As to a bridge taken into the State-aid system, the State Highway Department is made liable in the same manner as and even under the name of the county. *Schwarcz v. Charlton County*, 211 Ga. 923, 89 S.E. 2d 881, 884. Its liability is enforceable by suit against the county, and the intent seems clear to me that such suits can be maintained in the same courts as theretofore, including the federal courts. In my opinion, therefore, if the State Highway Department is considered as the real defendant in this case, its immunity to suit in a federal court has been waived.

JUDGMENT

Extract from the Minutes of June 30, 1958

No. 17045

GRADY COUNTY, GEORGIA

versus

IMOGENE WRIGHT DICKERSON

This cause came on to be heard on the transcript of the record from the United States District Court for

the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Grady County, Georgia, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, concurring generally and especially."

ORDER DENYING REHEARING

Extract from the Minutes of September 17, 1958

No. 17045

GRADY COUNTY, GEORGIA

versus

IMOGENE WRIGHT DICKERSON

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

ORDER STAYING MANDATE FILED:

September 29, 1958

UNITED STATES COURT OF APPEALS

For Fifth Circuit

GRADY COUNTY, GEORGIA

Appellant

versus

IMOGENE WRIGHT DICKERSON

Appellee

No. 17045

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 29 day of September, 1958.

Warren L. Jones
United States Circuit Judge.